

No. 05-914 JAN 19 2006

OFFICE OF THE CLERK  
In The  
**Supreme Court of the United States**

BERNARD JAMES WARD, JR.,

*Petitioner,*

v.

DOUG DRETKO, DIRECTOR, TEXAS  
DEPARTMENT OF CRIMINAL JUSTICE,  
CORRECTIONAL INSTITUTIONS DIVISION,

*Respondent.*

On Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Fifth Circuit

**PETITION FOR WRIT OF CERTIORARI**

DAVID L. BOTSFORD  
*Counsel of Record*  
LAW OFFICE OF  
DAVID L. BOTSFORD  
1307 West Ave.  
Austin, Texas 78701  
512-479-8030 (Tel)  
512-479-8040 (Fax)  
dbotsford@aol.com (E-Mail)

## QUESTIONS PRESENTED

For purposes of the Sixth Amendment's right to effective assistance of counsel, in determining whether "deficient performance" is "prejudicial" in the context of a state discretionary sentencing scheme in a non-capital case, is the proper standard the "any amount of jail time" test promulgated by this Court in *Glover v. United States*, 531 U.S. 198 (2001), as a clarification of *Strickland v. Washington*, 466 U.S. 668 (1984), or the "significantly less harsh" sentence test first announced by the Fifth Circuit in *Spriggs v. Collins*, 993 F.2d 85 (5th Cir. 1993), and applied in Petitioner's case?

Is application of the Fifth Circuit's "significantly less harsh" sentence standard to determine that the state court's conclusion of "no prejudice" was not "objectively unreasonable" inconsistent with its duty under 28 U.S.C. § 2254(d)(1) to apply *Strickland v. Washington*, 466 U.S. 668 (1984), and *Glover v. United States*, 531 U.S. 198 (2001) as the "clearly established Federal law, as determined by the Supreme Court of the United States"?

## TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED .....	i
TABLE OF CONTENTS .....	ii
TABLE OF AUTHORITIES .....	iv
OPINIONS BELOW .....	1
JURISDICTION .....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS...	1
STATEMENT .....	2
1. Overview Of The Case .....	2
2. Detailed Statement Of The Case.....	4
REASONS FOR GRANTING THE WRIT .....	10
1. The Fifth Circuit's "Significantly Less Harsh" Sentence Test Conflicts With This Court's Decisions In <i>Strickland v. Washington</i> and <i>Glover v. United States</i> .....	10
2. The Fifth Circuit's "Significantly Less Harsh" Sentence Test Conflicts With Decisions Of Other Federal Courts .....	18
3. The Fifth Circuit Applied A Standard Of Prejudice More Demanding Than That Applied By The State Court And Also Violated Its Duty To Apply "Clearly Established Federal law" Under 28 U.S.C. § 2254(d)(1) .....	20
4. The Issues Appear To Be Of Nationwide Significance In Federal And State Courts.....	22
CONCLUSION .....	24
PRAYER FOR RELIEF .....	25

**TABLE OF CONTENTS – Continued**

	Page
Appendix A:      Fifth Circuit Opinion .....	A1
Appendix B:      Opinion Of United States District Court.....	B1
Appendix C:      Fifth Circuit Opinion On Rehear- ing .....	C1

## TABLE OF AUTHORITIES

	Page
<b>CASES</b>	
<i>Burger v. Kemp</i> , 483 U.S. 776 (1987).....	15
<i>Caspari v. Bohlen</i> , 510 U.S. 383 (1994) .....	11
<i>Collins v. Youngblood</i> , 497 U.S. 37 (1990) .....	7
<i>Commonwealth v. Brown</i> , 711 A.2d 444 (Pa. 1998).....	18
<i>Crucean v. United States</i> , 113 Fed.Appx. 171 (7th Cir. 2004) .....	19
<i>Curry v. Palmateer</i> , 62 Fed.Appx. 157 (9th Cir. 2003) .....	19
<i>Daniel v. Cockrell</i> , 283 F.3d 697 (5th Cir. 2002) .....	7
<i>Durrive v. United States</i> , 4 F.3d 548 (7th Cir. 1993).....	19
<i>Evans v. Thigpen</i> , 809 F.2d 239 (5th Cir. 1987), <i>cert. denied</i> , 483 U.S. 1033 (1987).....	18
<i>Evans v. State</i> , 827 A.2d 157 (Md. App. 2003) .....	18, 24
<i>Ex parte Duffy</i> , 607 S.W.2d 507 (Tex. Crim. App. 1980) .....	21
<i>Ex parte Langley</i> , 833 S.W.2d 141 (Tex. Crim. App. 1992) .....	21
<i>Glover v. United States</i> , 531 U.S. 198 (2001)..... <i>passim</i>	
<i>Godinez v. Moran</i> , 509 U.S. 389 (1993).....	7
<i>Goodrich v. Smith</i> , 643 F. Supp. 579 (N.D. N.Y. 1986) .....	19
<i>Greenup v. State</i> , 2002 WL 31246136 (Tenn. Crim. App. 2002).....	7, 24

## TABLE OF AUTHORITIES – Continued

	Page
<i>Hernandez v. State</i> , 988 S.W.2d 770 (Tex. Crim. App. 1999).....	20, 21
<i>Jansen v. United States</i> , 369 F.3d 237 (3rd Cir. 2004).....	20
<i>Janvier v. United States</i> , 793 F.2d 449 (2nd Cir. 1986).....	19
<i>Johnson v. United States</i> , 313 F.3d 815 (2nd Cir. 2002).....	20
<i>Jones v. Kemp</i> , 706 F. Supp. 1534 (N.D. Ga. 1989).....	18
<i>Kyles v. Whitley</i> , 514 U.S. 419 (1995).....	9
<i>Lemon v. Kurtzman</i> , 403 U.S. 602 (1971).....	18
<i>Lockhart v. Fretwell</i> , 506 U.S. 364 (1993).....	15, 16
<i>Long v. State</i> , 883 P.2d 167 (Okla. Crim. App. 1994).....	18
<i>Martin v. United States</i> , 109 F.3d 1177 (7th Cir. 1996).....	13
<i>Milburn v. State</i> , 15 S.W.3d 267 (Tex. App. – Houston [14th Dist.] 2000) .....	20, 21
<i>Parke v. Raley</i> , 506 U.S. 20 (1992).....	7
<i>People v. Kimble</i> , 651 N.W.2d 798 (Mich. App. 2002) .....	24
<i>People v. Manners</i> , 2004 WL 242920 (Mich. App. 2004) .....	24
<i>Pickens v. Lockhart</i> , 714 F.2d 1455 (8th Cir. 1983) .....	21
<i>Rompilla v. Beard</i> , 125 S.Ct. 2456 (2005).....	11
<i>Sandoval v. Calderon</i> , 231 F.3d 1140 (9th Cir. 2000) .....	18
<i>Spriggs v. Collins</i> , 993 F.2d 85 (5th Cir. 1993) ....., <i>passim</i>	
<i>State v. Davidson</i> , 335 S.E.2d 518 (1985).....	19

## TABLE OF AUTHORITIES – Continued

	Page
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984) .....	<i>passim</i>
<i>Taylor v. Gilkey</i> , 314 F.3d 832 (7th Cir. 2002) .....	7
<i>Taylor v. Kentucky</i> , 436 U.S. 478 (1978) .....	7, 9
<i>Teague v. Lane</i> , 489 U.S. 288 (1989) .....	7, 24
<i>United States v. Blodgett</i> , 970 F.2d 614 (9th Cir. 1992) .....	9
<i>United States v. Booker</i> , 125 S.Ct. 738 (2005) .....	14, 22, 23
<i>United States v. Brim</i> , 148 Fed.Appx. 619 (9th Cir. 2005) .....	19
<i>United States v. Cronic</i> , 466 U.S. 648 (1984) .....	10
<i>United States v. Giry</i> , 818 F.2d 120 (1st Cir. 1987), cert. denied, 484 U.S. 855 (1987) .....	18
<i>United States v. Glover</i> , 101 F.3d 1183 (7th Cir. 1996) .....	12
<i>United States v. Grammas</i> , 376 F.3d 433 (5th Cir. 2004) .....	7
<i>United States v. Hanger</i> , 1993 WL 128015 (4th Cir. April 23, 1993) .....	19
<i>United States v. Horey</i> , 333 F.3d 1185 (10th Cir. 2003) .....	7, 19
<i>United States v. Kissick</i> , 69 F.3d 1048 (10th Cir. 1995) .....	19
<i>United States v. Phillips</i> , 210 F.3d 345 (5th Cir. 2000) .....	13
<i>United States v. Ray</i> , 828 F.2d 399 (7th Cir. 1987) .....	19
<i>United States v. Ridgeway</i> , 321 F.3d 512 (5th Cir. 2003), cert. denied, 528 U.S. 977 (1999) .....	7

## TABLE OF AUTHORITIES – Continued

	Page
<i>United States v. Soto</i> , 10 Fed.Appx. 226 (4th Cir. 2001) .....	19
<i>Vela v. Estelle</i> , 708 F.2d 954 (5th Cir. 1983).....	21
<i>Ward v. State</i> , 1999 WL 125404 (Tex. App. – Austin 1999, pet. ref'd).....	3
<i>Weinberger v. United States</i> , 268 F.3d 346 (6th Cir. 2001) .....	19
<i>Williams v. Taylor</i> , 529 U.S. 362 (2000).....	11, 16
<i>Wiggins v. Smith</i> , 539 U.S. 510 (2003).....	11
<i>Woodson v. North Carolina</i> , 428 U.S. 280 (1976) .....	15
<i>Wright v. West</i> , 505 U.S. 277 (1992) .....	11
 STATUTES	
18 U.S.C. § 3553 .....	23
28 U.S.C. § 1254 .....	1
28 U.S.C. § 2254 .....	2, 3, 20, 22, 25
28 U.S.C. § 2255 .....	7
 OTHER AUTHORITIES	
Court Organization Statistics, Bureau of Justice Statistics, U.S. Department of Justice at Table 45; <a href="http://www.ojp.usdoj.gov/bjs/courts.htm">http://www.ojp.usdoj.gov/bjs/courts.htm</a> .....	24
<i>Nancy J. King, The Origins Of Felony Jury Sentencing In The United States</i> , 78 Chicago-Kent L.Rev. 927 (2003) .....	23
Oregon Senate Bill 528 (2005) .....	23

## **PETITION FOR WRIT OF CERTIORARI**

Petitioner, Bernard James Ward, Jr., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

---

### **OPINIONS BELOW**

The Fifth Circuit's decision, reported at 420 F.3d 479, is reprinted as **Appendix A**. The order of the Court of Appeals denying rehearing is reprinted as **Appendix C**. The District Court's opinion is reprinted as **Appendix B**.

---

### **JURISDICTION**

The Fifth Circuit entered judgment on August 9, 2005. **Appendix A**. Petitioner's timely filed motion for rehearing was denied on October 26, 2005. **Appendix C**. This Court has jurisdiction under 28 U.S.C. § 1254.

---

### **CONSTITUTIONAL AND STATUTORY PROVISIONS**

Amendment VI: In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence.

Amendment XIV: . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

28 U.S.C. § 2254(d)(1): An application for a writ of habeas corpus . . . shall not be granted . . . unless the adjudication of the claim -

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

---

## STATEMENT

### 1. Overview Of The Case

Petitioner pleaded guilty to various counts contained in two separate indictments in Texas state court. Because Petitioner was eligible for probation from a jury on all counts to which he pleaded, he elected to have a jury trial on the issue of punishment as to all counts in both indictments. The jury ultimately assessed his punishment as follows: the statutory maximum of 10 years on one count (possession of child pornography), the statutory maximum of 20 years on each of four counts (indecency with a child and sexual abuse of a child), and sixty years on each of three counts (aggravated sexual abuse of a child).<sup>1</sup>

---

<sup>1</sup> The prosecutor asked the jury for a life sentence on the aggravated sexual assault counts and did not address the punishment for the other, less serious counts. Petitioner's trial counsel requested probation as to all counts. The jury instructions stated that as to the aggravated sexual assault charges, Petitioner would have to serve 30 calendar years flat or 1/2 of any sentence imposed, whichever was less, before parole could be granted. As to the indecency with a child and sexual assault charges (all of which were second degree felonies carrying a maximum of 20 years), the jury was erroneously instructed (without an objection by Petitioner's counsel) that Petitioner would have to serve 30 calendar years flat or 1/2 of any sentence imposed, whichever was less.

(Continued on following page)

After an unsuccessful direct appeal, *Ward v. State*, 1999 WL 125404 (Tex. App. – Austin 1999, pet. ref'd), Petitioner sought collateral relief in state court contending that his attorney had rendered ineffective assistance of counsel at, *inter alia*, the punishment trial. After his state court writ of habeas corpus was denied without a hearing,<sup>2</sup> Petitioner sought relief under 28 U.S.C. § 2254. The United States District Court found that Petitioner's trial counsel, Hugh Lowe, rendered deficient performance in regard to five specific acts and/or omissions regarding the punishment trial **and that this deficient performance was prejudicial.**<sup>3</sup>

---

before parole could be granted. As to the child pornography count, the jury was instructed that Petitioner would have to serve 1/4 of any sentence imposed, including flat and good conduct time, before he would be eligible for parole. Thus, Petitioner effectively received the maximum sentence on all counts except the aggravated sexual assault charges, and even as to those counts, his 60 calendar year sentence was the functional equivalent of a life sentence for purposes of parole eligibility.

<sup>2</sup> The state habeas court did not find Petitioner's counsel ineffective and also found that, even if counsel had provided deficient performance, there was no prejudice.

<sup>3</sup> The District Court denied relief on Petitioner's claim that his counsel's performance was deficient for failure to file a motion to suppress, but granted a certificate of appealability on that issue. The Fifth Circuit denied this cross-appeal, *see Appendix A* at A1, A6-A7, A9-A15, in part because “[t]he record contains no indication that Lowe failed to conduct an adequate investigation into the law and facts relevant to the suppression motion.” *Appendix A* at A11. As reflected by Petitioner's motion for rehearing to the Fifth Circuit, this conclusion is factually incorrect because Petitioner's state court writ alleged, under oath, that trial counsel filed a “bare-bones suppression motion (drafted by trial counsel's law clerk)” (explanation in original), State Court Writ at page 3, and that “[t]rial counsel's file contains nothing that indicates he researched the search and seizure issues.” State Court Writ at page 43.

Respondent appealed and a panel of the Fifth Circuit found, with some modifications, that all five specific instances did in fact constitute deficient performance and that the state courts' findings to the contrary were objectively unreasonable. **Appendix A** at A15-A32. But the Fifth Circuit also concluded that the state courts' finding of "no prejudice" was not objectively unreasonable because Petitioner had failed to prove that he would have received a "**significantly less harsh**" sentence, as mandated by *Spriggs v. Collins*, 993 F.2d 85 (5th Cir. 1993). **Appendix A** at A32-A36. The Fifth Circuit expressly refused to adopt Petitioner's position that this Court's "any amount of jail time" test from *Glover v. United States*, 531 U.S. 198, 203 (2001), was the proper standard for determining prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). **Appendix A** at A32 n.54. On rehearing, the Fifth Circuit declined to reconsider Petitioner's position that *Glover* had overruled *Spriggs*, stating that "absent a more compelling instruction from the Supreme Court, we decline to reconsider the *Spriggs* approach at this time." **Appendix C** at C5.

## 2. Detailed Statement Of The Case

The District Court found five factual bases for counsel's ineffectiveness at the punishment stage of the trial:

- (1) counsel's failure to request a curative instruction or move for a mistrial after the prosecutor queried a defense witness whether the **names, addresses and telephone numbers of jurors who granted probation to a defendant could be ordered by a judge to be**